No. 80-607

In the Supreme Court of the United States

October Term, 1980

STATE OF MISSOURI,
Respondent,

vs.

MARK E. SAGER,
Petitioner.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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REPLY TO RESPONDENT'S ARGUMENT
POINT ONE

Petitioner restates his position that the trial court erred to the prejudice of the Petitioner and the Missouri Court of Appeals, Western District of Missouri, compounded the error, to the prejudice of the Petitioner in overruling the Petitioner's motion to suppress evidence of an oral statement given on October 1, 1977, because the statement was not obtained pursuant to the requirements of *Miranda v. Arizona;* by permitting the State to cross-examine the Petitioner about oral statements given on October 2, 1977 and October 5, 1977 and also permitting the use of those statements for rebuttal purposes because those statements were

not sufficiently truthworthy to be used for impeachment purposes to attack the credibility of Petitioner's trial testimony.

The trial of *State of Missouri v. Sager*, 600 S.W. 2d 541 (Mo. App. W.D. 1980) was commenced on May 23, 1978 and ended June 1, 1978. The jury found the Petitioner guilty of manslaughter and his sentence was later assessed by the Court at ten (10) years in the Department of Corrections of the State of Missouri.

At the time of trial counsel for Petitioner Sager attempted to present his defense within the framework of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); *Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971) and *Walder v. U.S.*, 347 U.S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954). Counsel for Petitioner Sager was under the impression that these cases held that unless defendant in his direct examination referred to any of the matters contained in the summaries of the oral statements given on October 2, 1977 and October 5, 1977 same would be inadmissible on cross-examination by the State and also inadmissible on rebuttal. Counsel strenuously objected to the State's going into any matters on cross-examination that would bring out the contents of the statements made on October 2, 1977 and October 5, 1977 which heretofore had been suppressed by the trial court by the use of the State's case in chief. The trial court noted defendant's objection and overruled same. (Tr. 1845)

It would appear from the majority opinion in the *Harris* case, supra, that limited cross-examination by the State of matters referred to in direct examination would be permitted but nowhere in the majority opinion of the *Harris* case, supra, does it indicate that the State could fully cross-examine defendant on all matters contained in summaries of oral statements allegedly made by defendant

which had previously been suppressed for use by the State in its case in chief.

The majority opinion in the *Harris* case, supra, certainly does not indicate that said statements could be used by the State as rebuttal.

The *Harris* case, supra, was a split decision and the Petitioner believes that the dissenting opinion in the *Harris* case more correctly stated the Court's position as to the use of the alleged statements as *rebuttal evidence.* (Emphasis ours)

Counsel for Petitioner Sager filed his last Brief in the Missouri Court of Appeals, Western District, on November 19, 1979 and cited as one of his principal authorities, to sustain his position with reference to cross-examination of Petitioner and use of oral statements in rebuttal, the case of *U.S. v. Havens,* 592 F. 2d 848 (5th Cir. 1979). Counsel for Petitioner Sager is embarrassed by his failure to note that a Writ of Certiorari in the *Havens* case was granted to the Supreme Court and certain portions of *Harris,* supra, and *Havens,* supra (5th Circuit), were further enlarged and reversed by this Court by Opinion handed down May 27, 1980, *U.S. v. Havens,* 100 S. Ct. 1912, 64 L. Ed. 2d 559 (1980).

It would appear that again this Court has rendered a split decision with reference to this very important point. After carefully studying *U.S. v. Havens,* 100 S. Ct. 1912, counsel for Petitioner Sager believes and agrees with the majority of this Court when it said:

> "It is essential, therefore, to the proper functioning of the adversary system that when a defendant takes the stand, the government be permitted *proper* and effective cross-examination in an attempt to elicit the truth." (Emphasis ours)

Certainly no law abiding citizen, especially a lawyer, would want otherwise. At the same time the privileges granted to persons accused of crimes by the Constitution of the United States should not be weakened to a point of extinction!

In the Sager Opinion, the Missouri Court of Appeals, Western District, noted that the State had failed to carry its burden showing the State was not aware of the entry of defense counsel at the hearing upon the motion to suppress, *State v. Sager,* 600 S.W. 2d at 561.

Transcript of the Motion to Suppress Evidence and depositions of Officer Luther, Officer Mills, Officer Diester, Officer Bell and Officer Beeler clearly show that Officer Diester and Officer Luther and Officer Mills flagrantly violated defense counsel's demand that his client NOT be interrogated without his presence.

Counsel for Petitioner Sager restates his position that such a flagrant violation of Petitioner's rights can only be properly prevented by totally excluding the use of said statement entirely. However, counsel has no case directly on that point and at this time requests that this Court examine the Sager case within the framework of *U.S. v. Havens,* 100 S. Ct. 1912, supra, wherein the case said:

> "We reaffirm this statement of the competing interests, and hold that a defendant's *statements made in response to proper cross-examination reasonably suggested by the defendant's direct examination* are subject to otherwise proper impeachment by the government, albeit by evidence that has been illegally obtained that is inadmissible on the government's direct case, or otherwise, as substantive evidence of guilt." (Emphasis ours)

The Petitioner is attaching as an Appendix the complete trial testimony of Petitioner Sager and humbly sug-

gests to the Court that the cross-examination by the State, over the objection of Defendant, and the later use of said oral statements on rebuttal, over the objection of defendant, was not reasonably "SUGGESTED" by defendant's direct examination and therefore prejudicially inadmissible.

CONCLUSION

Petitioner Sager, for reasons outlined in previous sections of Reply to Respondent's Brief in Opposition to Petition, respectfully urges this Court to grant Petitioner's Petition for a Writ of Certiorari to the Missouri Court of Appeals, Western District.

Respectfully submitted,

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APPENDIX

[1828] MARK EDWARD SAGER,

called as a witness in his own behalf, having been first duly sworn, under oath testified as follows:

Direct Examination

By Mr. Brown:

Q. Would you state your full name, please? A. Mark Edward Sager.

Q. What is your age, Mark? A. Seventeen.

Q. You're the defendant in this case, are you not? A. Yes, I am.

Q. Calling your attention to the events of September 2nd, 1977, do you recall what you did that day? A. Yes, I do.

Q. Starting with about 12:15 or twelve o'clock on September 2nd, 1977, where were you? A. At what time?

[1829] Q. About twelve o'clock, around noon. A. I was at school.

Q. What did you do? A. At 11:55 I signed out at the office.

Q. Speak up. A. Went to the pay phone and called my mother.

Q. Did she come then to Platte City to get you? A. Yes, she did.

Q. What did you do next? A. We went out in the parking lot and she picked me up and I asked her if she could—[interrupted]

Q. Don't say what you asked. Where did your mother take you if anyplace? A. She took me to home.

Q. What did you do at home? A. She jump-started my car at that time.

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Q. Then where did you go? A. I went straight to work.

Q. Where did you work? A. At Riverside Drive-In in Riverside, Missouri.

Q. Do you remember the telephone number of where you worked there? A. Yes. 741-0811.

Q. What time did you get to work? A. Around about 1:15, 1:30.

[1830] Q. What were you doing at work that day? A. Mowing the grass.

Q. How were you dressed? A. I had a pair of blue jeans and T-shirt and pair of boots.

Q. Did you have those boots that we have marked that you have seen this pair around the courtroom? A. Yes, I did.

Q. Exhibit 12. Were you wearing those boots? A. Yes, those boots.

Q. Did you wear your shirt all afternoon or did you take it off while you were working? A. I took it off while I was working.

Q. While you were there that afternoon, did anyone give you a message about three o'clock or so? A. Yes.

Q. What type of message was it? A. That I was supposed to call someone at work.

Q. Did they give you the name of the party you were supposed to call? A. No, they didn't.

Q. Think a minute, give us the best recollection you can of the time that someone told you that you had to make a phone call or you had a phone call. A. I would have to say it was about ten-, fifteen-after-three.

Q. Did you recall that call immediately? [1831] A. No, I did not.

Q. Did you attempt to call someone then from down at the Riverside? A. Yes, I did.

Q. Where did you make the call from the building? A. I made it from the box office right there.

Q. Who did you call? A. I called Paula Fee.

Q. Is that the young lady that testified the other day? A. Yes, it is.

Q. Where did you call her? I mean, where was she? A. She was at work.

Q. Where did she work? A. She worked at Holiday Inn at KCI.

Q. Did you talk to her there? A. Yes, I did.

Q. Did she give you a message? A. Yeah.

Q. As best again that you recall, what time do you think you made that telephone call? A. Around about twenty-after, fifteen, around there.

Q. What did you do after that? A. Went and asked Dennis if I could get off work early because I had to go in the hospital.

Q. Did he have you do anything else after that? [1832] A. Yes, he did.

Q. What did you have to do? A. I had to finish mowing the bank next to the road, the grass up there.

Q. How long did it take you to do that? A. About five, ten minutes, fifteen at the most.

Q. Then what did you do next with reference to leaving? A. I went and asked Dennis if he could jump-start my car.

Q. Did he help you jump-start your car? A. Yes, he did.

Q. Then what did you do? A. I went straight home.

Q. Tell us the route you took to go home? A. Well, I came out of the Riverside Drive-In and I went to I-29 and proceeded north on I-29 to 112th Street, and went about maybe a thousand yards, and then turned on Am-

bassador Drive and I went to the Holiday Inn and drove around the parking lot.

Q. What was the purpose of going into the Holiday Inn? A. To see if Paula was still at work.

Q. Did you expect to see her car there in the lot or something? A. Yeah.

Q. Was it there? A. No, it was not.

Q. Where did you go from there? [1833] A. I went on the access road of O Highway to O Highway; from O I went to 92 Highway over to B Highway to home.

Q. Is that a normal way for you to go home? A. Mostly normal.

Q. When you got home, who was there, if anybody? A. My brother was home.

Q. Tell us in your best judgment what time did you get home? A. I got home around about ten-after-four.

Q. What did you do? A. I asked my brother— [interrupted]

Q. No, no. Mark, you can't talk about things you talked about. What did you do after you got home? A. I made phone calls.

Q. Who'd you call? Who'd you talk to? A. I talked to Paula.

Q. Paula Fee; same girl? A. Yes.

Q. Where did you call her this time? A. She was at home.

Q. Did she again give you a message? A. Yes, she did.

Q. After that, did you attempt any more telephone calls? A. Yes, I did.

Q. Tell us what calls you tried to make. [1834] A. I tried to call back down to Riverside Drive-In.

Q. At first, did you receive busy signals or something? A. Yes, I did.

Q. Did you finally make connection at the Riverside Drive-In? A. Yes, I did make a connection.

Q. Did you talk to anyone? A. No, I did not.

Q. Tell us about that connection. A. I had received a busy signal two or three times, and then at the last attempt to call down, I then received the ringing sound and as about the second ring someone picked the phone up and then put the phone back down.

Q. Did that cause you to be angry? A. Yes, it did.

Q. What did you do then? A. I put the phone down hard.

Q. Did it break it? A. Yes.

Q. Then right after that what were you doing then at home? A. I tried to fix the phone.

Q. Did anyone help you? A. Yes, my brother did.

Q. Your little sister wasn't home when you got there; right? A. No, she was not.

Q. Did she come in after a bit? [1835] A. Yes, she did.

Q. What time does she usually get home on the bus; do you know? A. Around about 4:30.

Q. Did she come in about her usual time? A. Yes.

Q. Did you see anyone else at your home about that time? A. Danny Wheeldon and Greg Baggett arrived then.

Q. Do you know, just your best judgment, what time they got there? A. Around 4:30 to twenty-five-to-five.

Q. What did you do? A. We tried to install an AM radio.

Q. What happened next? A. My mother and father came and told me I was going to have to go to the hospital.

Q. Then what happened? A. I got in the car and drove to the hospital.

Q. Do you know what time you got to the hospital? A. Around about five, ten-till-six.

Q. Were you finally then admitted to the hospital? A. Yes, I was.

Q. Did you stay there? A. Yes.

Q. Your mother and father left? A. Yes.

[1836] Q. Mark, there was a young lady on the stand the other day that said you had some mats in the front of your automobile. Describe to the jury the floor matting material, what-have-you, that's in the front of your automobile. A. Well, in the front of my automobile I do not have any floor mats at all. I have pieces of rubber that's been sewed into the carpet.

Q. Does that have an appearance of being like a mat? A. Yes, it does.

Q. You remember when you were arrested, I am sure, don't you? A. Yes, I do.

Q. Do you remember when the police officers were interviewing you in Platte City? A. Definitely do.

Q. Did they read you your Miranda rights? A. Yes, they did.

Q. You remember when Officer Luther testified the other day, do you remember he said that you understood your rights, but you wouldn't sign the form which is a written form that you understood your rights; do you remember him testifying to that? A. Yes, I do remember what Mr. Luther said.

Q. Why wouldn't you sign that at that point? A. Because I did not understand my rights at that time. And my mother told me not to sign anything at all.

[1837] Q. You also heard him state that later that you said that if he would let you talk to your father,

you would tell him how Julie was killed; did you make that statement? A. No, I did not.

Q. Did you ask for a lawyer while this was all going on? A. I did not ask for no lawyer because I had not done anything.

Q. You didn't want to see your father? A. Yes, I did.

Mr. Brown: May I have just a moment, Your Honor.

Q. [By Mr. Brown] You remember when your tooth impressions were taken at Menorah Hospital? A. Yes, I do.

Q. The day before they were taken, a couple officers talked to you about it, didn't they? A. Yes, they did.

Q. When they were talking to you about taking your tooth impressions, did they say anything about this bite mark? A. Yes, they did.

Q. What did they tell you about the bite mark? A. They said Julie had been bitten on the breast.

Q. So as of the 15th or 16th of September you had that knowledge, didn't you? A. Yes, I did.

Q. You didn't hesitate to give them your tooth impressions, did you? [1838] A. No, I did not.

Q. They took a set that day and then came back later and took a whole bunch of them, didn't they? A. Yes, they did.

Q. You didn't hesitate at all to give them to them? A. I told them I did not have anything to hide because I did not kill Julie Wittmeyer.

Q. You didn't ask for any advice from a lawyer to see if they could legally do that?

Mr. Allred: I object to the leading form of the question.

The Court: Sustained. Don't lead your witness. Reframe your question.

Q. [By Mr. Brown] Did you seek advice of a lawyer before giving those tooth marks? A. No, I did not.

Mr. Allred: I object, leading form of the question.

The Court: Sustained.

Q. [By Mr. Brown] I'll ask you now, Mark, jam out: Did you kill Julie Wittmeyer? A. No, I did not kill Julie Wittmeyer.

Mr. Brown: That's my direct examination, Your Honor.

The Court: Cross-examination.

Cross-Examination

By Mr. Allred:

[1839] Q. Mark, you say you—you said you didn't understand what these officers read to you? A. I told them I understood, but I did not understand of the rights they had read to me.

Q. Which part did you not understand? A. The right to remain silent.

Q. That was the first thing that was told to you on your rights, that you had a right to remain silent? A. Yes. Yes, I did have the right, but I did not understand why they was questioning me.

Q. Did you understand—they told you that anything that you say could be used in a court of law against you? A. Yes.

Q. You understood that? A. Yes. In a way.

Q. Then you went ahead and talked to the police officers? A. Yes, I did.

Q. When you talked to the police officers, did you tell them the truth? A. Yes, I told them the truth.

Q. All right. Everything you said to the police officers in these statements, various statements, was the truth? A. Yes, it was.

Q. All right. Starting with—when your mother came to get you, did you get in an argument with her? [1840] A. No, sir, we did not.

Q. You didn't argue with her at all? A. No, sir, we did not.

Q. Did you want her to take you to the drive-in theater? A. Yes, I did want her to take me.

Q. Did you ask her to? A. Yes, I did.

Q. Did she take you to the drive-in theater? A. No, she did not.

Q. What happened? How did you go to the drive-in theater? A. Drove my own car.

Q. Do you recall when Officers Mills and Luther interrogated you on October 1st, 1977, the day of your arrest? A. Yes, I do.

Q. Did you tell them the truth? A. Yes, I did.

Q. Did you make the statement that, Mark said his mother wanted to drive him to the drive-in, but he refused to let her do this and told her the only way he he would go to work was if she would take him home and get his own car? A. No. I did not make such statement.

Q. You did not make such statement? A. No.

Q. If that statement is in this record, it's a lie by the police officers? [1841] A. Yes, it is.

Q. If the police officers wanted to lie about the thing, couldn't they have written out a confession? A. I do not understand your question.

Q. If the police officers wanted to lie in their reports, they could have just written out a confession for you couldn't they? A. No.

Q. What would keep them from it? Integrity? A. Just Mr. Luther and Mr. Mills did lie about it.

Q. I said, if they wanted to lie about it, they could write out the whole confession for you exactly how you killed Julie? A. They could have.

Q. They didn't though, did they? A. No, they did not.

Q. Now, having said it that way, do you recall when you got home, were your brother and sister there? A. No, they were not.

Q. Do you remember making this statement to Officer Luther: Mark was asked what time he arrived home and he said he did not have a watch and had to guess at the time and estimated it to be just a few minutes past 4:00 p.m. because his younger brother and sister were watching Gilligan's Island on TV when he entered the house. A. That is not true.

[1842] Q. That's not true either? A. No, sir.

Q. Again the officers lied? A. Yes.

Q. Did you ask the police officers what time Gilligan's Island came on—and did they ask you what time Gilligan's Island came on and you said "Four o'clock"? A. They asked me what time Gilligan's Island came on and I told them I thought around four o'clock.

Q. Thought it was about 4:00. Do you now know it came on at 4:30? A. Yes, I do.

Q. When did you learn that? A. When I was at the hospital.

Q. So when you got home, it was after Gilligan's Island was already on, it was after 4:30? A. At the day that Gilligan's Island came on it was beginning a time change and I told the officers that at the time I was home that Gilligan's Island was on.

Q. You told them—you did tell them Gilligan's Island was on; right? A. Yes, I did.

Q. And so what you're telling me is it had changed to 4:30; right? A. Yes.

[1843] Q. And so it was at least after 4:30 when you got home? A. No, it was not.

Q. I thought you said Gilligan's Island was on and it changed to 4:30. A. Gilligan's Island was on at 4:30 and now it's changed to four o'clock.

Q. When did it change to 4:00? A. On September 2nd.

Q. On that very day it changed? A. I do believe.

Q. Did you ever tell the police officers when you got home that your brother and sister were there and they were watching cartoons? A. No, I did not.

Q. Did the police officers in the Luther interrogation, that is Luther and Mills, when they interrogated you right after arrest, you know? A. Yes, sir.

Q. Did—Mark was asked what it would take to tell us how—Mark was then asked what it would take to get him to tell us how his teeth impression got on Julie's breast and how Julie was killed—right; did they ask you that? A. They did ask me that.

Q. Your answer was: "Mark then replied 'If my Dad tells me to tell you, I'll tell you everything and how Julie was killed.'" [1844] A. I did not make that statement. I told them I would like to talk to my Dad because I had not done anything.

Q. Is that statement a lie in the report, too? A. Yes, it is.

Q. Did you ever tell the police officers that you left the theater at Riverside Drive-In Theater sometime between 3:00 and 4:00 and you weren't sure what time it was?

A. At that time I was scared and everything and I told them I had left between 3:00 and 4:00.

Q. Now you tell us differently? A. Yes. After I have had time to think about it, I do know what time I left.

Q. On the first of October, you had had a month to think about it since Julie was killed on September 2nd; right? A. Yes, I did.

Q. You told them you didn't know what time, but it was sometime between 3:00 and 4:00? A. Yes. I was scared and they were interrogating me and pushing me. I told—[interrupted]

Q. Pushing you, you said? A. Yes. Mr. Luther was pointing his finger in my chest.

Q. I see. When you gave them the answer you gave them a truthful answer, didn't you? A. I told them to the best of my knowledge I did leave between 3:00 and 4:00.

[1845] Q. Could have been any earlier than three o'clock? A. No, sir, it could not.

Q. You didn't sign out your time that day, did you? A. No. My time—I could have signed out and I could not have. I do not know.

Q. Did you tell the officers you signed out at 3:45? A. I told them it was around 3:45 when I should have left.

Q. When you what? A. Should have left.

Q. You didn't know what time you did leave? A. I left—I do know what time I did leave.

Q. You do now? A. Yes.

Q. But you thought it was between 3:00 and 4:00 then? A. At what time?

Q. When the officers interviewed you on October 1st. A. Yes, I did.

Q. All right. Now, do you recall riding over to Lexington, Missouri, too, with Officer Deister and Dayringer?

Mr. Brown: Come up, please.

[The following proceedings were held at the bench OUT OF THE HEARING of the jury:]

Mr. Brown: Your Honor, I am going to object to him going into anything that has to do with any statement taken after October 1st. Court has sustained my Motion to [1846] Suppress filed by the defendant.

Mr. Allred: Opens it up. He made a complete denial of the crime. The Harris case opens it up for impeachment purposes.

The Court: Objection overruled. Your objection will run to any of this testimony. I'll show it running to all of it.

Mr. Brown: He can't go into every matter.

The Court: I'll hear your objection if you believe there is one. The general objection to those matters, I'll preserve it for you.

[The following proceedings were held WITHIN THE HEARING of the jury:]

Q. [By Mr. Allred] Do you remember taking a ride to Lexington, Missouri, with Officer Deister and Corporal Dayringer? A. What day is that?

Q. October 2nd, 1977. A. Yes, I do.

Q. Next day after your arrest? A. Would be October 3rd.

Q. Where did they take you to? A. Took me to Lexington jail.

Q. All right. When—as you drove through that car, did you talk—while you were in the car, did you talk to anybody about the crime? [1847] A. No, I did not.

Q. You did not say a word about it at all? A. Yes, I did at one time.

Q. What did you say? A. I told Mr. Deister that I would complete my verbal statement.

Q. That you wouldn't what? A. That I would complete my verbal statement.

Q. That you would complete your verbal statement? That is the verbal statement that you started on the day before, October 1? A. Yes, it was.

Q. Did you tell Officer Deister that when you got to your house you shut off your engine, went inside the house, the approximate time at this point was 4:15; upon entering the house that your parents were not at home, but your brother and sister were there watching television, Channel 41 on television; and went on to say that some cartoons were playing? A. That is not the statement I made.

Q. Did you not make that statement? A. No.

Q. The officer lied again? A. Yes, he did.

Q. Now, did you tell Officer Deister, as you completed your statement, that you stated that you picked up the phone and [1848] tried to telephone Riverside in—and in an attempt to contact your parents, but you received a busy signal; did you tell them that? A. Yes, I did.

Q. At which time you slammed the telephone receiver down so hard that it broke the telephone? A. Yes.

Q. You told them that? A. Yes, I did.

Q. You didn't tell them about any three times to try to call Riverside? A. They asked if I tried to call Riverside Drive-In. I said yes.

Q. You didn't tell them about any three times? A. No, I did not.

Q. You got a busy sound, didn't you? A. Yes, I did.

Q. If you got a busy sound, there wouldn't be any telephone call on that bill. May I have that bill, please?

There wouldn't be any toll call. It's not marked.

Mr. Brown: It's on the third page.

Q. [By Mr. Allred] There is a call on 9-2—I'm sorry, yeah, 9-2 to Parkville, Missouri, 816-741-0811. What number is that? A. That is the number of the Riverside Drive-In.

[1849] Q. That's the call that your brother made to tell you to get home because your parents were looking for you? A. No, that is not.

Q. Or they were on the way to the drive-in to get you? A. No, that's not. I made that phone call.

Q. If it was busy, there wouldn't be any charge on here, would they? A. I did get a connection.

Q. That doesn't answer my question. A. Yes, it was busy two times.

Q. Wouldn't be any charge, would it? A. No.

Q. Do you remember during that ride with Detective Deister, that he asked you how much gasoline you had in your car when you left the Riverside Inn? A. Yes, I do.

Q. What was that? A. That he stated that he asked me how much gas I had.

Q. What did you answer? A. One-quarter of a tank.

Q. Didn't you tell your mother you had a full tank of gasoline? A. No, I did not.

Q. You didn't tell your mother that when you were arguing with her about taking you home to your car? A. I told her I had enough gas to get to work and back.

[1850] Q. Do you remember when you were being interrogated by Officers Deister and Bell on the first, October 1st, not October 2nd when you were going to Lexington; right? A. Yes, I do.

Q. Did you tell them the truth at that time? A. Yes, I did.

Q. "Mark then stated since his car had a full tank of gasoline in it, they both agreed Mrs. Sager would drive Mark home, give his vehicle a jump-start, then he would drive on to work himself." Was that accurate? A. No, it was not.

Q. You lied to the officers? A. No, I did not.

Q. Did the officers lie about putting that down? A. Yes, they did.

Q. You didn't say that? A. No, I did not.

Q. Do you remember being interrogated again on the 2nd by Deister and Dayringer on the way up to Lexington? A. Yes, I do.

Q. Do you remember them asking you what time it was that Danny Wheeldon appeared in your house? A. Yes, I do.

Q. Danny Wheeldon, Wheeldon, I am sorry. [1851] A. Yes, I do.

Q. Do you remember talking to them about that? A. Yes.

Q. What time did you tell them Wheeldon got there? A. I can't recall, but Danny and Greg did arrive somewhere around twenty-five to, 4:30, somewhere around there.

Q. Do you remember telling them he arrived at approximately 4:40 p.m.? A. No, I did not.

Q. You didn't say that? A. No.

Q. That was a lie then the police officers wrote in there? A. Yes it was.

Q. Do you carry a knife with you? A. At this time—[interrupted]

Mr. Brown: Just a moment. I object. Come up.

[The following proceedings were held at the bench OUT OF THE HEARING of the jury:]

Mr. Brown: On this basis I am going to object, that's not in the purview of the direct examination. There's no evidence in here at all from any standpoint that he carries a knife.

Mr. Allred: I have a case I'll show the Court that once he states "I didn't do it", it opens up the entire scope of the crime.

[1852] [The following proceedings were held WITHIN THE HEARING of the jury:]

The Court: The objection will be overruled. Let's proceed.

Q. [By Mr. Allred] Do you remember talking to Officer Deister as you rode down there to Lexington? A. Yes, I do.

Q. I haven't finished my question yet. Do you remember telling him, him asking you when was the last time you were on HH Highway? A. Yes, I do.

Q. Do you remember giving this answer: "The last day was the Friday Julie was killed when on the school bus, the bus went down to Rowell's residence on the Interurban, turned around, went up to HH Highway, then west to Bethel Road, then south on Bethel Road to 92 Highway"? A. That's not correct statement I made. I did tell them I was on HH, but I had not been towards Julie's house. I was on HH with the school bus.

Q. With the school bus. Did you follow the school bus around? A. I was in the school bus.

Q. You was on it. I thought your mother took you home. A. This was in the morning.

Q. This was in the morning going to school. Did you ever make the statement to Mrs. Riegelman that you were the last person [1853] to see Julie alive? A. I

did not, because Mrs. Riegelman had her hands in my mouth and I couldn't have talked.

Q. So Mrs. Riegelman lied, too? A. Yes, she did.

Q. Did you tell Mrs. Riegelman that you had an air-tight alibi? A. I told Mrs. Riegelman I had an alibi.

Q. You could talk well enough to tell her that? A. When we was going into the office, into the chair in the dentist's office.

Q. You told her that? A. Yes.

Q. Did she ask you—did you make remark that you were the last one to see Julie alive? A. No, I did not because I did not kill Julie Wittmeyer.

Q. Okay. Do you remember Terry Deister asking you, Officer Deister as you rode to Lexington: "Is there any reason why the Metro Squad would find blood on the inside of your vehicle?" And you answered: "You might find some blood in the right-rear floorboard area. When I was working at Pioneer North Restaurant, I took some old liver from the restaurant to use for fish bait. I forgot to remove it from my car and it leaked all over my floor mat and it even started getting maggots on the underside of it." [1854] A. Yes, I did make that statement.

Q. Did Deister ask you if there is any reason they might find blood on the front seat? A. Yes, he did.

Q. What did you tell him? A. I told him at one time I had a bloody nose one night and he might find some blood on the front seat.

Q. So both of those things would have explained, if the police had found blood in your car, would explain why there was blood there, wouldn't it?

Mr. Brown: I object. Improper cross.

The Court: That objection will be sustained as to the question being argumentative in nature. Proceed.

Q. [By Mr. Allred] Are you aware of the fact that the detectives told you they didn't find any blood except two little drops? A. Detectives did not tell me.

Q. You never heard that before? A. No, I have not.

Q. Until just now? A. Until just now when the Regional Crime Lab testified.

Q. Do you now remember October 5th? This is a different date. We have October 1, October 2nd and now October 5th.

Mr. Brown: Would you come to the bench, please.

[The following proceedings were held at the bench OUT OF THE [1855] HEARING of the jury:]

Mr. Brown: Your Honor, I'd like to have the Court note I am going to object to the entire cross-examination in this line on any matters that took place on October 5th because, again, that was the matter of the Motion to Suppress and he should not be—you have ruled in my favor and he shouldn't be permitted to go into it. And I'd like to point out to the Court yesterday when we were talking about some statements and I asked the Reporter to put a rubber band in there, you said straight out that these statements had been suppressed. If they're suppressed, they're suppressed. They shouldn't be allowed.

The Court: You'll find my ruling was they're suppressed insofar as the State's case in chief.

Mr. Brown: That's what you said before, but yesterday—[interrupted]

The Court: I don't know what I said yesterday, but the docket sheet is my ruling. That's what I said. Your objection is noted and overruled.

[The following proceedings were held WITHIN THE HEARING of the jury:]

Q. [By Mr. Allred] You talked about a statement of October 1st; right? A. Yes.

Q. With Deister—I mean, with Luther and Mills? [1856] A. Yes.

Q. Then you talked about another statement on October 1st that continued after Luther and Mills stopped, and that was Deister that took that statement; right? A. Yes, Deister and another officer.

Q. Now you have talked about a statement made on October 2nd, haven't you? A. Yes, I have.

Q. Let's talk about one made on October 5th, 1977. All right? A. Okay.

Q. Do you remember Fred Mills and Luther coming up to the Lexington jail to talk to you? A. Yes, I do.

Q. Did you tell them the truth when they talked to you? A. Yes, I did.

Q. "Mark then told us—" What time did you tell them you left the theater? This is five days—three days after your arrest, now, four days. A. I can't recall the exact, but I told them it was in between around 3:30 or so.

Q. "Mark then told us he left the drive-in sometime between 3:00 and 4:00 p.m." Did you say that? A. No, I did not.

Q. You didn't. Is that a lie by the officers? A. Yes, it is.

[1857] Q. And drove up 129—I-29 to 112th street where you drove around Sambo's Restaurant looking for Paula's sister but did not find her? A. No. I did not state that.

Q. You didn't say that? That's a lie by the officers? A. Yes. I drove to Holiday Inn to see if Paula was in the parking lot.

Q. That's what you said in your direct testimony. A. Yes, it is.

Q. But on October 5, you said the statement that you went to Sambo's to look for Paula's sister was not made by you? A. That is a lie.

Q. Then did you tell them about whether or not your brother and sister were home when you got home? A. They asked me if any brother and sister was home at the time I was home and I told them when I got home my brother was, and then later on that afternoon my sister did come home.

Q. All right. Did you tell them, you didn't make this statement: "When he arrived home his brother and sister were watching Gilligan's Island on TV on Channel 41"? A. They asked me who was home at the time I was home, and I stated my brother and sister was home at the time I was home.

Q. And they were watching Gilligan's Island on TV? [1858] A. I told them, yes.

Q. Gilligan's Island started at 4:30? A. Yes.

Q. And it goes to five o'clock? A. On September 2nd, yes.

Q. So you got home at least after 4:30? A. No, sir. I told them that at the time I was home that Gilligan's Island was on between ten-after-four and five o'clock when I left.

Q. You just told me it started at 4:30. A. At that time, yes, it did.

Q. That's right. When you got home it was on? A. I did not state that.

Q. That's a lie? A. Yes, it is.

Q. Did you ask the police officer, that is Fred Mills and Mr. Luther talking to you over to the Lexington Jail, did you ask them what physical evidence they had against you? A. Yes, I did.

Q. What did they reply? A. They would not tell me.

Q. "We told him we had searched his house with a search warrant for the knife that was used to kill Julie Wittmeyer." A. They did not state that.

Q. They didn't say that? That's a lie? Then you said to them: [1859] "You didn't find it, did you?" Right; did you make that statement? A. No, sir, I did not.

Q. That's a lie, too. "We told him we found three knives and that we were checking them out. Mark then started grinning and laughed and said 'You're wasting your time and if you say that you got that knife that was used to kill her, you're lying to me because I know you don't have the right knife.'" A. I did not make that statement.

Q. That's a lie, too? A. Yes, it is.

Q. Do you remember the officers then telling you they didn't know what you meant by they didn't have the right knife; did they tell you that? A. Beg my pardon?

Q. "We then asked Mark how he could be so sure that they didn't have the right knife." Did they ask you that? A. No, sir, they did not.

Q. Is that a lie? A. Yes, it is.

Q. "He then started laughing again and said 'I know you will never find the knife that was used to kill her.'" You say that? A. No, sir, I did not.

[1860] Q. "We then asked Mark where he put the knife and he just smiled and said 'I know you will never find it.'" A. I did not make no statement.

Q. "When we asked Mark if he threw it in the Platte River", which was flooding at that time, by the way— "Platte River, and he continued to smile and said 'I told you I know that you will never find the knife.'" A. I did not make that statement.

Q. When's the first time you found out you were going to be taken to the hospital by your mother and father? A. When was the first time?

Q. Yes. A. On September 2nd.

Q. What time was that? A. When Paula called.

Q. When Paula called? A. Yes.

Q. Didn't you go to the hospital? A. Yes, I did.

Q. Were you scared of the hospital? A. Well, I don't think anybody likes hospitals. I was kind of scared, yes.

Q. Did you get angry about the fact that your mother and father were asking you to have treatment? A. No.

[1861] Q. Did you try to choke your mother; did you choke your mother that morning?

Mr. Brown: Just a minute. I object to that.

The Court: That objection will be sustained as to that particular question. Let's proceed.

Mr. Allred: As to form?

The Court: Objection will be sustained. Let's proceed.

Q. [By Mr. Allred] Do you recall the officers— again this is the officers who came over to interview you on the 5th of October; okay? A. Yes.

Q. You are oriented as to the place we are? A. Yes. Lexington Jail, we're at the Lexington Jail.

Q. Right, October 5, 1977. A. Yes.

Q. And did you tell the police, do you recall the police asking you if you really thought you could forget something as terrible as this killing was? A. Repeat the question.

Q. Do you recall telling the police, telling you could you really forget something as terrible as killing someone? A. No, I did not make that statement.

Q. Did not. Did you tell them one time you choked your mother and you knew it was wrong, but were able to put it out of your mind? [1862] A. No, I did not state that.

Q. That's a lie, too. Did you ask the police officers if they would try to help you get into the State Hospital? A. Did I ask them?

Q. Yes. A. No, I did not.

Q. Did you tell the police that you would rather not go to prison for murder because you thought they—you'd be killed by the other inmates? A. No, I did not.

Q. Because you were sure other inmates wouldn't like anyone who killed a young girl? A. That is what they told me. They said people down at the prison would not like what I—what they had done, and I told them that that just to leave me alone.

Q. Just to leave you alone.

Then did they ask you—I mean, then did you ask them if they would try to help you get into the State Hospital instead of the penitentiary? A. No.

Q. To get some treatment and some help? A. No, sir.

Q. Okay. That you would rather do that than go to prison; you didn't say that? A. No, sir, I did not.

[1863] Q. Did they tell you this would have to be something worked out between your attorney and the Court and then did you say "I am sure they'll convict me if I

have to go to trial and I would just as soon go to the State Hospital now"? Did you make that statement? A. No, sir. Mr. Luther and Mr. Mills did not ask me any questions at all.

Mr. Allred: We have no further questions.

The Court: Redirect.

Redirect Examination

By Mr. Brown:

Q. Yes, Mark. These statements that you have been thoroughly cross-examined about, was there anybody there with you except two big policemen? A. No, sir, there was not.

Q. Your mother and dad wasn't there with you? A. No, sir.

Q. I wasn't there with you? A. No, sir.

Q. Then after they did all these questions, did they come back with a typed-up summary of what they thought you said and put it down to you and let you read it? A. No, sir, they did not.

Q. Had they done that, you would have had an opportunity to do something about it, wouldn't you? [1864] A. Yes, I would have.

Mr. Allred: I object to the leading question.

The Court: Sustained. Don't lead your witness.

Mr. Allred: Move to strike the answer, ask the jury to disregard it.

Q. [By Mr. Brown] What would you have done if someone had showed you a summary of what they thought you said on that day, how would you have reacted? A. If it was the truth and I would have reacted that it was the truth, but if it was not, then I would have refused to sign it.

Q. You didn't have any opportunity at all to do that? A. No, sir, I did not.

Q. Do you recall an interview that—with a policeman Jesse McLendon and Larry Drewhurt [Phonetic Spelling], on September 12, 1977, at Menorah Hospital when your mother was present with you? A. Yes, I do.

Q. What did you tell those officers about your activities on September 2nd? A. I told them everything that happened that day.

Q. Then if they put in their report "Mark told the officers he left school around 12:15 when his mother picked him up," that's true? A. Yes.

[1865] Q. "Mark then went home, jump-started his car and went to work in Riverside Drive-In where he was a maintenance worker." That was true? A. Yes.

Mr. Allred: I object to the leading form of these questions.

The Court: Objection will be sustained. Let's proceed.

Q. [By Mr. Brown] Then what time did you tell them that you got off from work that day? A. I told them around about 3:45.

Q. What about time, you tell them about what time you got home that day? A. Yes, I did. I told them around about a quarter-after-five—four.

Q. What time did you tell them that your mom and dad arrived to take you to the hospital? A. About ten-till-five.

Mr. Brown: I have no more redirect.

The Court: Recross

Recross-Examination

By Mr. Allred:

Q. Taking you back again to September 12th, 1977, that's still another day, isn't it? A. Yes. At Menorah Hospital.

Q. Your memory was fresher then about these statements than it [1866] is now, wasn't it? A. Yes.

Q. And that your memory was fresher about what you told the officers then than it is now; right? A. Yes.

Q. Did you tell the officers that—let me see, McLendon on 9-12-77, did you tell Officer McLendon that you left the drive-in about 5:30—I'm sorry, 5:30.

Mr. Brown: Would you read that correctly? 1530.

Q. [By Mr. Allred] 1530 means 3:30.

The Court: Gentlemen, let's proceed.

Q. [By Mr. Allred] Went home arriving there about 4:15? A. Yes, I did.

Mr. Brown: Just a moment. He's misreading from this statement. You're supposed to be reading from the statement. It's 1600, four o'clock.

Q. [By Mr. Allred] What did you just now tell your lawyer what time you got home? A. I said around about ten-after-four, fifteen-after-four.

Q. Yes. So it wasn't four o'clock, then, was it? A. They asked me to give a round numbers and I said around about four o'clock.

Q. They asked you to round the numbers off instead of being specific? A. I told them I couldn't be specific because I did not have a [1867] watch.

Q. The truth of the matter is you're guessing about all these times, aren't you? A. I am going by the factors of time and everything, yes.

Mr. Allred: I have no further questions.

The Court: Redirect.

Mr. Brown: Nothing further.

The Court: Step down.

Call your next witness.

Mr. Brown: Call Detective Luther.

Mr. Allred: With leave of the Court, may I recall him for one question, the defendant?

Mr. Brown: No, sir.

I am sorry, Your Honor, that is not my prerogative. My prerogative is to object, and I do object.

Mr. Allred: Ask leave of the Court to recall the defendant.

Mr. Brown: I apologize to the Court.

[The following proceedings were held at the bench OUT OF THE HEARING of the jury:]

The Court: What is the question?

Mr. Allred: The question is: Did you have a wristwatch on?

The Court: I'll permit that inquiry.

[The following proceedings were held WITHIN THE HEARING of the [1868] jury:]

Mr. Brown: Take the stand again, Mark.

Further Recross-Examination

By Mr. Allred:

Q. Mark, did you have a wristwatch on this day? A. Today?

Q. Did you have a wristwatch on the days when you were talking to the police officers? A. No, I did not.

Q. Did you have a wristwatch on September 2, 1977? A. No, I did not.

The Court: Any redirect?

Mr. Brown: No, Your Honor.

The Court: Step down.

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